

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA

v.

LEE BOYD MALVO

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CRIMINAL No. 102888
Hon. Jane Marum Roush

**MEMORANDUM IN SUPPORT OF COMMONWEALTH'S
OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE VICTIM
IMPACT TESTIMONY**

The Supreme Court of the United States Corrects a Staggering Injustice

More than a decade ago the Supreme Court of the United States held that a state may properly permit a jury to consider victim impact evidence at sentencing in capital murder cases. Payne v. Tennessee, 501 U.S. 808 (1991). The decision in Payne demonstrated the Court's readiness to depart from a strict adherence to *stare decisis* when one of its earlier decisions was poorly reasoned and wrongly decided. Payne, 501 U.S. at 827, 828. Payne expressly overruled Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989).

Under Booth, introduction by the prosecution of evidence of the emotional, psychological or physical impact of the crime upon the victims was considered irrelevant and violative of defendant's rights under the Eighth Amendment's prohibition against cruel and unusual punishment. Following the dubious trail laid in Booth, the Court in Gathers further marginalized victims from the proceedings by holding that the prosecution could not comment on the personal qualities of the victim in final argument during sentencing. Fortunately, Booth and Gardner are no longer the law of the land.

The resolute decision of the United States Supreme Court in Payne marked the beginning of a sea change in the manner in which victims would be treated in our criminal justice system. Payne rejected the notion that capital defendants are entitled to be sentenced solely on their individual qualities, and in utter disregard of the harm which their crimes have caused to victims. Payne, 501 U.S. at 822.

After Payne, capital defendants would no longer be permitted to parade a horde of mitigation witnesses before the jury while the victim remained, at best, a phantom. Payne explicitly recognized the state's legitimate interest in countering the defendant's mitigation evidence with evidence of the unique characteristics and attributes of the victim, as well as the loss to his family as a result of his death. Payne, 501 U.S. at 825.

Virginia Amends its Capital Punishment Sentencing Statute

In 1998, some six years after the decision in Payne, the Virginia General Assembly amended Va. Code § 19.2-264 by adding a provision allowing juries in capital cases to hear evidence of the impact of the crime upon the victim. Va. Code § 19.2-264.4.A1 limits the factors about which the victim may testify to those set forth in Va. Code §19.2-299.1(i) through (vi).

The Supreme Court of Virginia has Held Victim Impact Testimony Relevant and Admissible in Capital Sentencing Proceedings

Even before the enactment of Va. Code § 19.2-264.4.A1, the Virginia Supreme Court upheld the admission of victim impact testimony under Payne. In Weeks v. Commonwealth, 248 Va. 460 (1994), the Court held that victim impact

evidence is relevant to punishment in capital murder prosecutions in Virginia. In upholding the admissibility of the testimony of the victim's widow and co-workers as to the profound loss experienced by the deceased's surviving family and friends, the Court quoted from Payne as follows:

A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. Payne, 501 U.S. at 827.

The Court in Weeks, found additional support for its holding in the rationale of the United States Supreme Court in Payne:

For the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. Payne, 501 U.S. at 825; Weeks, 248 Va. at 476.

In Kasi v. Commonwealth, 256 Va. 407 (1998), the Court rejected the capital defendant's argument that the admission of testimony from the victim's widow in the sentencing phase violated his right to "the due process standard of fundamental fairness."

Defendant's Contention that a Jury is Unable to Separate Admissible Evidence from Inadmissible Evidence When a Victim Impact Witness Make a Potentially Prejudicial Comment is Without Merit

The Defendant argues that a jury would be unable to separate admissible evidence from inadmissible evidence, if victim impact witnesses are permitted to testify in the sentencing phase. However, this suggestion was specifically rejected in Emmett v. Commonwealth, 264 Va. 364 (2002). In Emmett, the Court noted that juries are presumed to follow the Court's instructions. Emmett, 264 Va. at 371, citing

LeVasseur v. Commonwealth, 225 Va. 564 (1983) and Weeks v. Angelone, 528 U.S. 225 (2000).

During their testimony in the sentencing phase in Emmett, the victim's family members appeared sporadically to come close to expressing their opinions as to the appropriate sentence. On each occasion where this occurred, the court took prompt action by interrupting the testimony and instructing the jury to disregard it. Emmett held that the trial court's handling of the testimony of these witnesses was appropriate and prevented any undue influence or prejudice from infecting the jury. Emmett, 264 Va. at 371.

Defendant's Argument That Victim Impact Testimony Must be Limited to Testimony regarding Victims Who Were Actually Present At the Scene of the Murder is Without Merit

Defendant's argument is based primarily upon his misreading of Justice Sandra Day O'Connor's concurring opinion in Payne, 401 U.S. at 832, 833. Defendant's undue emphasis on portions of Justice O'Connor's opinion distorts the meaning of her opinion. For instance, Defendant makes the naked assertion that "of central importance" to Justice O'Connor's opinion was the fact that the testimony described the impact of the crime upon a person "who was personally present at, and immediately affected by, the murder(s)." Yet nowhere in Justice O'Connor's concurring opinion does she even imply, much less declare, that victim impact testimony must be limited in such a manner. Payne, 401 U.S. 832, 833.

The testimony admitted in Payne was that of a grandmother of two children. The defendant in that case had attacked the two children and their mother with a knife. One of the children and the child's mother were stabbed to death by defendant.

The surviving child was stabbed in such a manner as to completely pierce his body from front to back.

The grandmother was not present when the killings occurred. The substance of her testimony was simply that the surviving little boy cried often for his mother. Additionally, she offered that the baby sister of the murdered girl could not understand why her big sister was not coming home. Payne, 401 U.S. at 832. Unfortunately, testimony of this type is standard fare in homicide cases.

Nevertheless, in concurring with the holding that the victim impact testimony was admissible, Justice O'Connor simply noted that the jury already had an "unavoidable familiarity with the facts of [defendant's] vicious attack." In this regard, she pointed out that the jury had viewed a grisly videotape of the murder scene. Finally, Justice O'Connor remarked that the testimony of the grandmother surely did not inflame the jury any more than the facts of the crimes themselves. Payne, 401 U.S. at 833. These comments were made in support of her position that the victim impact testimony was not overly prejudicial when considered in light of the grisly evidence to which the jury had already been exposed.

In the instant case, the jury will similarly be exposed to a great amount of gruesome evidence with respect to the killings of innocent victims. Just as Justice O'Connor concluded in Payne, the victim impact testimony in the instant case will not be overly prejudicial when considered in the context of all of the evidence which the jury will hear.

Regardless, nowhere in Justice O'Connor's concurring opinion does she limit victim impact testimony solely to evidence pertaining to the crime's impact upon

those who were present at the scene of the crime. Instead, her opinion is an eloquent argument in support of the right of states to pass laws allowing for the presentation of evidence concerning the unique nature of each human victim as well as the impact of the crime on the victim's family and community. Payne, 401 U.S. at 832,833.

The Virginia Supreme Court has upheld the admission of victim impact testimony regarding witnesses who were not present at the crime. Weeks, 248 Va. at 476. Weeks upheld the relevance and admissibility of general victim impact testimony from the decedent's widow and coworkers where a lone state trooper was murdered during a traffic stop. In Thomas v. Commonwealth, the Court held that Code § 19.2-264.4(A1) does not bar persons who may have relevant victim impact testimony from testifying. 263 Va. 216, 235 (2002).

The Defendant's suggestion that the testimony of victims must be confined to the impact of the crime upon victims who were present when the crime was committed is based upon a tortured interpretation of law. Defendant's strained reading of the pertinent cases cannot withstand close scrutiny. The Commonwealth urges the Court to reject the Defendant's proposed limitations on the content of victim impact testimony as contrary to law and public policy.

Victim Impact Evidence is Relevant to Vileness and Depravity of Mind

In Weeks the Court held "... under Virginia's modern bifurcated capital procedure, victim impact evidence is probative, for example, of the depravity of mind component of the vileness predicate, which the jury in this case found as a basis for imposing the death penalty." 248 Va. at 476.

Victim Impact Testimony is Admissible In Order to Allow the Jury to Assess the Specific Harm Caused by the Crime

Under the protection afforded them by the Eighth Amendment, defendants are permitted to introduce virtually any evidence in mitigation of punishment. Payne, 501 U.S. at 827; Department of Corrections v. Clark, 227 Va. 525 (1984). The broad leeway granted defendants in the introduction of mitigating evidence is doubtless a reflection of the requirement that each capital defendant be treated "as a uniquely individual human being." Woodson v. North Carolina, 428 U.S. 280 (1976).

By the same token, the Supreme Court of the United States in Payne, held that states are free to "...legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated." Payne, 501 U.S. at 828.

Virginia elected to accept formally, the Supreme Court's invitation, when it enacted Va. Code § 19.2 264.4. A1. Therefore the victim impact evidence in this case ought to be admitted and considered just as any other relevant evidence. The Commonwealth does not suggest that the jury is not bound to find the statutory aggravators beyond a reasonable doubt before considering the imposition of the death penalty. The jury will be fully instructed with respect to the various factors and standards involved in determining whether the Defendant is eligible for death. The Commonwealth merely argues in accordance with the above cited authorities, that the jury must be allowed to consider the specific harm caused by the defendant's crimes in determining the appropriate punishment.

Conclusion

Assuming for purposes of argument that he is found guilty, it is anticipated that the Defendant will take full advantage of the latitude the law affords him in the presentation of so called mitigating evidence. It is not unusual to hear from a defendant's grade school teachers, neighbors, friends and relatives during capital sentencing proceedings. All of these witnesses will contribute what they can to the proceeding. As the Court pointed out in Payne, "human nature being what it is, capable lawyers trying cases to juries try to convey to the jurors that the people involved in the underlying events are, or were, living human beings, with something to be gained or lost from the jury's verdict." In addition, an assortment of learned and highly skilled psychologists and psychiatrists will doubtless strive to unravel the mysteries of the Defendant's mind for us laymen who lack the training and experience to make these judgments for ourselves. All of this testimony will wash over the jury and they will either reject or accept the testimony and opinions of these witnesses. The jury will then weigh this evidence in conjunction with all of the other evidence in the case.

In this great effort much will be learned about the Defendant, and this is only fair. The Commonwealth does not challenge that the Defendant is constitutionally entitled to present all of these matters to the jury. No one disputes that Defendant's lawyers are duty bound to make sure this evidence is presented to this jury.

However, it would simply be wrong to limit the testimony at sentencing to the Defendant's witnesses. As the Tennessee Supreme Court stated: "It is an affront to

civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of the Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.” 791 S.W. 2nd, at 19.

The Commonwealth simply requests that the Court allow the specific harm caused by this Defendant to be explained to the jury through the testimony of the survivors of these killings. This testimony will be brief and narrowly focused, especially in comparison to the lengthy and wide ranging testimony permitted to the accused under the circumstances.

Respectfully submitted,

RAYMOND F. MORRIS
Deputy Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Commonwealth's Opposition to Defendant's Motion for Admission of Prison Life Evidence as Rebuttal to Commonwealths' Evidence of Future Dangerousness was made available and mailed to Michael Arif, Esquire and Craig Cooley, Esquire, Counsels for the Defendant, this 21st day of March, 2003.

RAYMOND F. MORROGH
Deputy Commonwealth's Attorney

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CRIMINAL No. 102888

Hon. Jane Marum Roush

COMMONWEALTH'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL
MOTION TO PRECLUDE USE OF UNADJUDICATED ACTS

Virginia's capital sentencing scheme does not violate the principles set forth in either Ring v. Arizona, 536 U.S. ____ 01488 (2002) or Apprendi v. New Jersey, 530 U.S. 466 (2000). Ring held the Arizona capital punishment scheme to be constitutionally defective because it provided that a defendant could only receive the death penalty if a judge made a factual determination that an aggravating factor existed. Since the Sixth Amendment guarantees defendant a jury trial, the portion of Arizona's statute that allowed the trial judge to make the factual determination as to the existence of an aggravating factor rendered the statutory scheme unconstitutional.

Virginia's capital punishment scheme contains no such provision. Under Virginia law, in a trial by jury, the jury is required to make all factual determinations. Va. Code § 19.2-264.2 et seq. Thus, the Virginia scheme comports with the requirements of the Sixth Amendment and does not run afoul of the holding in Ring.

In Apprendi, the defendant was charged with illegal possession of a handgun, an offense which under New Jersey law, carried a punishment of from 5 to 10 years in the penitentiary. The defendant who admitted to shooting into the home of an African-American family because he wanted them out of his neighborhood entered a

plea of guilty to the charge. Subsequently, the prosecutor filed a motion to enhance the sentence under New Jersey's hate crime law. The charge to which defendant had already pleaded guilty contained no reference to the hate crime statute or its provisions regarding enhanced punishment. The court sentenced the defendant in Appendi to 12 years in the penitentiary, 2 years in excess of the maximum sentence he could have received under the charge to which he plead guilty. Moreover, the judge was merely required by the statute to find by a preponderance of the evidence that defendant's crime was racially motivated.

In reversing defendant's conviction in Appendi, the Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than a prior conviction must be proved beyond a reasonable doubt under familiar principles of due process. Appendi, 530 U.S. at 474-497.

While the Commonwealth concedes the continuing viability of the holding in Appendi, it respectfully submits that is inapposite to the case at bar. In the instant case, the Defendant will stand trial on the same charges on which the Grand Jury indicted him. Additionally, the maximum punishment he faced on the day he was indicted, life or death, remains the same. Neither the crime nor sentencing range has changed during the pendency of these proceedings. The Commonwealth is not seeking to enhance the crime or alter the range of punishment. The range has always been the same.

Further in accordance with Virginia Code § 19.2-264.4 the penalty of death may not be imposed unless the Commonwealth proves beyond a reasonable doubt the

aggravating factor in question. Hence, Virginia's capital punishment scheme comports with the holding in Appendi.

In Thomas v. Commonwealth, 37 Va. App.748 (2002), the Court held that "disparate penalties do not spawn gradations of the offence." Id at 754. In Thomas the defendant faced a firearms charge with a punishment range of from 1 to 5 years. However since he had previously been convicted of a violent felony he faced a mandatory minimum of 6 months if convicted. In affirming defendant's conviction in Thomas, the court rejected the claim that the mandatory minimum sentence somehow created gradations of the offense. The court flatly stated "the crime is not defined by the penalty." Id. At 754, citing Appendi v. New Jersey, 530 U.S 466 (2000).

Defendant's argument that the use of the word "probability" in Va. Code § 19.2 -264.4 C somehow renders Virginia's statutory scheme unconstitutional is without merit. The provision in question explicitly requires the Commonwealth to prove future dangerousness beyond a reasonable doubt. Defendant's discourse on the meaning of the statute does nothing to detract from the constitutional viability of Virginia's statutory scheme. For all of the above reasons as well as for others that may be advanced upon the hearing of this Opposition to Defendant's Motion the Commonwealth respectfully requests that the Court Deny Defendant's Motion.

Respectfully submitted,

RAYMOND F. MORROGH
Deputy Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Commonwealth's Response to Defendant's Supplemental Motion to Preclude Use of Unadjudicated Acts was made available and mailed to Michael Arif, Esquire, 8001 Braddock Road, Suite 105, Springfield, VA 22151 and Craig Cooley, Esquire, 3000 Idlewood Avenue, P. O. Box 7268 Richmond, VA 23221, Counsels for the Defendant, this 21st day of March, 2003.

RAYMOND F. MORROGH
Deputy Commonwealth's Attorney